Filed 7/22/19 P. v. Spencer CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

| | |
|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>IAN SHAWN SPENCER,<br>Defendant and Appellant. | E070520<br>(Super.Ct.No. INF1702163)<br>OPINION |

APPEAL from the Superior Court of Riverside County. Conditionally reversed with directions. Richard A. Erwood, Judge.

James M. Kehoe, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Genevieve Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

A jury found defendant and appellant, Ian Shawn Spencer, guilty as charged of making criminal threats (Pen. Code, § 422;[1] count 1), second degree burglary (§ 459), and falsely representing his identity to a police officer. (§ 148.9, subd. (a); count 3). The jury also found that defendant personally used a deadly or dangerous weapon, a tree branch, in count 1. (12022, subd. (b)(1).) In a bifurcated trial, the court found defendant had one prison prior, one prior strike, and one prior serious felony conviction. (§§ 667.5, subd. (b), 667, subds. (c), (e)(1) & 667, subd. (a).) Defendant was sentenced to 11 years in state prison,[2] and appeals.

Defendant claims: (1) the court prejudicially erred in failing to instruct the jury sua sponte on the lesser offense of attempted criminal threats in count 1 (§§ 664/422) because substantial evidence shows the victim in count 1, E.S., did not actually experience sustained fear; (2) in light of Senate Bill No. 1393, the matter must be remanded so the court may exercise its new discretion to strike or not strike the five-year term on his prior serious felony conviction (§§ 664, subd. (a), 1385, subd. (a)); and (3)

---

[1] Undesignated statutory references are to the Penal Code.

[2] Defendant's 11-year sentence is comprised of the middle term of two years on count 1, doubled to four years due to the prior strike conviction, plus one year for the deadly weapon enhancement, one year for the prison prior, and five years for the prior serious felony conviction. The court imposed but stayed a two-year term on count 2 and imposed a concurrent 15-day jail term on count 3.

the judgment must be conditionally reversed and remanded with directions to the court to determine whether defendant is eligible for a pretrial mental health diversion program. (§1001.36.)

We conclude that any error in failing to instruct on the lesser offense of attempted criminal threats was harmless. Based on the entire record, there is no reasonable probability that the jury would have convicted defendant of attempted criminal threats, rather than the completed crime, had the jury been instructed on the lesser offense.

We conditionally reverse the judgment and remand the matter with directions to the trial court to determine whether defendant is eligible for a pretrial mental health diversion program pursuant to section 1001.36, enacted effective June 27, 2018. If the court determines defendant is not eligible for diversion or if defendant fails to complete diversion, the court must reinstate defendant's convictions and resentence defendant. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 790-792, 796 (*Frahs*) [section 1001.36 applies retroactively to all judgments not final when the statute was enacted eff. June 27, 2018], [review granted. Dec. 27, 2018, S252220]; *People v. Weaver* (2019 ___ Cal.App.5th ___ [2019 Cal.App.LEXIS 602] [same]; cf. *People v. Craine* (2019) ___ Cal.App.5th ___ (*Craine*) [2019 Cal.App.LEXIS 482] [section 1001.36 applies only prospectively].)

If defendant successfully completes diversion, the court must dismiss the charges. (*Frahs, supra,* 27 Cal.App.5th at p. 792.) If, however, the judgment is reinstated and defendant is resentenced, the court must exercise its discretion whether to impose a five-

year term on defendant's prior serious felony conviction, in light of Senate Bill No. 1393 which, effective January 1, 2019, amended sections 667 and 1385 to give courts discretion *not* to impose a five-year term on a prior serious felony conviction. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971-973.)

II.

FACTUAL BACKGROUND

In April 2017, E.S. was working night shifts alone as a cashier at a convenience store in La Quinta. "'[S]trange characters'" came into the store at night "[a]ll the time." One night in April, defendant kept walking in and out of the store and pacing back and forth inside the store near the juice aisle. E.S. asked defendant whether he was "'okay'" and defendant "rambled off about something," then left the store. Three nights later, defendant was in the store parking lot asking people for a ride. E.S. told defendant he could not do that on store premises because it was trespassing. E.S. politely asked defendant to leave, and defendant said, "'No problem, thank you,'" and left.

The following night, around midnight on April 20, defendant came into the store with a friend. E.S. was again working alone behind the cashier's counter, which was open with no glass. An unlocked "hip-high" "pony door," which could easily be jumped over, separated the area behind the counter from the rest of the store. When defendant and his friend came into the store, E.S. recognized defendant and felt nervous because he had asked defendant to leave the premises the night before. Defendant walked "a little weird" to an aisle and continued to look at E.S. in a "weird" way. Suddenly, defendant's

facial expression changed, and he looked angrily at E.S. He began pacing and walked to the cashier area near E.S. Then, unprovoked, defendant "strongly kicked" the pony door and started yelling at E.S. Defendant put up his fists and acted as if he were trying to intimidate E.S. and pick a fight with E.S. Defendant's friend appeared nervous and began apologizing for bringing defendant inside the store, but according to his body language, defendant's friend did not appear fearful of defendant. E.S. began looking for a phone to call 911, and defendant walked out of the store.

Moments later, and before E.S. was able to call 911, defendant came back into the store, carrying a large wooden tree branch which was "[m]ore like a club." He held the tree branch with both hands, like a baseball bat, and threatened to hit E.S. in the head with it. He either told E.S., "'I'm going to bash your head in'" or "'If you come over the counter, I'm going to bash your head in.'" When defendant threatened him, E.S. was standing at the register, around three to four feet away from defendant. Because his life was being threatened, E.S. stood back from the register and called 911.

The 911 call, which lasted four minutes 33 seconds, was played for the jury. E.S. told the 911 dispatcher that defendant was trying to intimidate him and had a "stick" as a weapon in his hand. E.S. also reported, "he said he's gonna hit me in the head with the club. . . . He has a club in his hand and he's threatening to hit me with it." While E.S. was still on the phone with the dispatcher, defendant walked out of the store and stood outside, swinging the tree branch around and repeating his threats to hit E.S. with the tree branch. Before the 911 call ended, sheriff's deputies arrived and apprehended defendant

outside the store. Near the end of the 911 call, and after the deputies arrived, E.S. told the dispatcher, "I was just kinda afraid for my life." E.S. also told one of the responding deputies that defendant had threatened to kill him with the tree branch and that he had asked defendant to leave the store on two prior occasions.

When a deputy asked defendant for his name, defendant twice identified himself as other individuals. Defendant had in his possession a court card with his name on it, and a system check verified that the name on the court card was defendant's. A pocketknife was also found in defendant's pocket. While sitting in the back of a sheriff's vehicle, defendant told the deputy that the "wetback" had punched him and he was "defending himself" from the beaner." He also said he was "killing polar bears" and "began howling like a dog." Based on defendant's behavior, the deputy suspected defendant was under the influence. Before he was booked into jail, defendant was taken to a hospital where it was determined he had no life-threatening injuries which required continuing medical care.

B. *Defense Evidence*

Defendant's friend, T.W., was with defendant at the store on April 20 and testified for the defense. T.W. knew defendant "[t]hrough a work relationship." T.W. was already at the counter when defendant walked into the store. As defendant walked into the store, T.W. saw that defendant was, "walking kind of a goofy walk." T.W. thought defendant was "doing a show" or "a joke for [T.W.]" and described defendant's actions as "comical."

At some point, defendant walked to the end of the counter and kicked the pony door, but then he "immediately backed up." The clerk [E.S.] moved "[a]ggressively" toward defendant, said he was going to call 911, and told defendant to get out of the store. In response, defendant continued to back up toward the door, "almost like a kid who knew he did something wrong . . . ." At this point, defendant said something to the clerk like, "'You know what you did, you're not going to get away with it.'" T.W. was not afraid of defendant.

The clerk continued to walk "aggressively" toward defendant, told him to "'Get the fuck out of the store'" and that he was "'calling the cops.'" Defendant walked out of the store for a "[c]ouple minutes" then came back into the store with a "tree clipping," while the clerk was "in the middle of checking [T.W.] out" at the counter. At that point, defendant again told the clerk "'You're not going to get away with it. She's going to press charges.'" This made no sense to T.W.

T.W. saw that defendant had "the stick" or tree branch on his shoulder when he walked back into the store, but defendant stood behind T.W. while T.W. was at the counter, and T.W. did not see defendant "hold the stick in front of him pointed at the clerk," or swing the stick around. The clerk did not appear to fear defendant. T.W. described the clerk's demeanor as "[m]ore just agitated" or "perturbed" that defendant was in the store. T.W. was "amused" by the tree branch, but he knew defendant and did not believe he was going to "do anything." T.W. thought defendant "was being a clown," and T.W. did not hear defendant threaten the clerk.

T.W. had picked up defendant that night because defendant was "stranded," had gotten "into a fight," and needed gas for his car. Before T.W. and defendant arrived at the store, defendant asked T.W. if they could go to another gas station. T.W. did not know that defendant had been in the store before.

III.

DISCUSSION

A. *Any Trial Court Error in Failing to Instruct Sua Sponte on the Lesser Offense of Attempted Criminal Threat in Count 1 Was Harmless*

Defendant claims the trial court prejudicially erred in failing to instruct sua sponte on the lesser included offense of attempted criminal threats in count 1. (§ 664, 422.) We conclude that any error in failing to instruct on attempted criminal threats was harmless.

1. Applicable Legal Principles

Defendant was charged and convicted in count 1 of making criminal threats, a violation of section 422. "In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person

threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat *actually caused* the person threatened 'to be in *sustained fear* for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228, italics added.)

An attempted criminal threat is committed in several "potential circumstances" including, as relevant here, when the defendant specifically intends to place the victim in sustained fear, but the victim, for whatever reason, does not actually experience sustained fear. (*People v. Toledo*, *supra*, 26 Cal.4th at p. 231; *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 607.) Sustained fear "is a state of mind" that lasts for a period of time "'that extends beyond what is momentary, fleeting, or transitory.' [Citation.]" (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1024; *People. v. Fierro* (2010) 180 Cal.App.4th 1342, 1349.) The element of sustained fear has subjective and objective components: the victim must actually be in fear (the subjective component), and the fear must be reasonable under the circumstances (the objective component). (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 417.)

The victim's knowledge of the defendant's prior conduct is also relevant to whether the victim actually experienced sustained fear (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156), and there is no minimum amount of time that the victim must have actually experienced sustained fear in order to establish the sustained fear element. (See *People v. Fierro*, *supra*, 180 Cal.App.4th at pp. 1346, 1349 ["the minute during

which [the victim] heard the threat [of the defendant to shoot and kill the victim and the victim's 14-year-old son] and saw the . . . weapon [the gun the defendant displayed in his waistband] qualifies as 'sustained' fear under the statute"].) "When one believes he is about to die, a minute is longer than 'momentary, fleeting, or transitory.'" (*Id*. at p. 1349.)

A trial court has a duty to instruct sua sponte on a lesser included offense if substantial evidence shows the defendant committed the lesser but not the greater offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Substantial evidence in this context means evidence from which a reasonable trier of fact could conclude that the defendant committed the lesser but not the greater offense. (*Ibid*.) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*Ibid*.) We review de novo whether the trial court erroneously failed to instruct on a lesser included offense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)[3]

[3] In discussing the jury instructions, defense counsel pointed out to the court that attempted criminal threats is a lesser offense to a criminal threats, but defense counsel said she was not asking the court to instruct on attempted criminal threats. Defendant's failure to request the instruction, however, did not absolve the court of its duty to instruct sua sponte on attempted criminal threats if substantial evidence showed defendant committed attempted criminal threats, but not the completed crime. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 162-163 [the court's sua sponte duty to instruct on lesser included offenses "arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued"].)

2. Analysis

First, defendant argues substantial evidence, namely, T.W.'s testimony and parts of E.S.'s testimony, showed that E.S. did not actually experience sustained fear when defendant threatened to "bash his head in" with the tree branch, and that E.S. instead experienced either (1) no fear, or, (2) at most, a momentary, fleeting, or transitory fear.

Defendant points to T.W.'s testimony that, in T.W.'s opinion, E.S. did not appear to be afraid of defendant. He also points out that, when defense counsel asked T.W. asked whether E.S. appeared "concerned" about defendant coming into the store with "a stick," T.W. testified, "More just agitated. 'Get out of my store.' He's got a counter between [defendant] and [himself]. I think [E.S. was] just more perturbed that [defendant was] in the store."

Second, defendant points to T.W. testimony that *he*, T.W., was "amused" by the "tree clipping" that defendant was holding, which had "leaves sticking off it." T.W. did not think defendant "was going to do anything" with the tree branch, that defendant "was being a clown," and when T.W. was at the counter, defendant was "behind" T.W. "at all times." Based on T.W.'s testimony, defendant argues that a reasonable juror could have concluded that E.S. was "not in fear at all, much less sustained fear for his own safety."

Third, defendant points to the 911 call, in which E.S. told the dispatcher that he was "behind a barricade" and that there was a "countertop" between himself and defendant. E.S. also told the dispatcher. "I don't wanna hit this kid." Defendant argues a reasonable juror could have understood E.S.'s statements to mean E.S. was "protected

by the 'barricade' or 'countertop[,]'" was "therefore less likely to experience fear[,]" and "wasn't in fear of the threat from [defendant], but simply did not want to have to fight [defendant]."

Fourth, defendant observes that, while E.S. was talking with the 911 dispatcher, defendant was outside of the store but still on the premises, and T.W. was trying to check out at the counter and leave the store. But "rather than letting" T.W. and defendant leave the store premises, E.S. told T.W. that T.W. and defendant could not leave because he had already called 911. Defendant argues this evidence supports a reasonable inference that E.W. was not in any fear for his safety because, if he were, he would have wanted defendant to leave the store premises as soon as possible, rather than wait for the police to arrive.

Finally, defendant argues that, even if E.S. experienced fear, substantial evidence shows E.S. experienced no more than a momentary, fleeting, or transitory fear (*People v. Allen*, *supra*, 33 Cal.App.4th at p. 1151), because E.S.'s entire encounter with defendant was brief and the entire 911 call only lasted three minutes 44 seconds. Actually, the record shows that the 911 call lasted four minutes 33 seconds. In any event, defendant argues that the brevity of the both E.S.'s entire encounter with defendant and the 911 call, coupled with the evidence that when E.S. made the 911 call defendant had already left the store and did not reenter, supported an instruction on attempted criminal threats. (See *People v. Toledo, supra,* 26 Cal.4th at p. 231.)

The People counter, "[t]here was no substantial evidence contradicting the evidence that E.S. was [actually] in sustained fear," and T.W.'s testimony "did not speak to" E.S.'s subjective experience of fear. The People also argue, "the only evidence offered by [defendant] on the issue of whether the victim's [E.S.'s] fear was reasonable was T.W.'s claim that the victim did not appear scared. Such testimony did not constitute substantial evidence of the lesser offense in the absence of any observations T.W. allegedly made to support his opinion, T.W.'s apparent bias, and the lack of any prior relationship which would indicate T.W. had a basis for evaluating E.S's state of mind.

The evidence that E.S. did not experience sustained fear was weak, but even if substantial evidence shows E.S. neither actually nor reasonably experienced sustained fear, we conclude that any trial court error in failing to instruct sua sponte on the lesser offense of attempted criminal threats was harmless. The erroneous failure to instruct on a lesser included offense is reversible error only if the entire record shows there is a reasonable probability that the defendant would have realized a more favorable result absent the error, that is, if the jury been instructed on the lesser offense. (*People v. Ngo* (2014) 225 Cal.App.4th 126, 158; *People v. Breverman*, *supra*, 19 Cal.4th at p. 165.) "'Probability'" in this context does not mean more likely than not; it means a reasonable chance, more than an abstract possibility. (*College Hospital v. Superior Court* (1994) 8 Cal.4th 704, 715.) Here, the entire record shows there is not a reasonable chance, or more than an abstract possibility, that the jury would have convicted defendant of attempted criminal threats had the jury been instructed on the lesser offense.

We first observe that E.S.'s testimony and statements during the 911 call show that E.S. both actually and reasonably experienced sustained fear. (§ 422.) Toward the end of the 911 call, when the deputies were outside the store, E.S. told the 911 dispatcher, without being prompted or responding to a question, that he "was just kinda afraid for [his] life." At trial, E.S. testified that, after defendant threatened to "bash" E.S.'s head "in" with the tree branch, E.S. stood back from the register and called 911 because his "life" was being threatened. Thus, E.S.'s testimony and 911 call statements showed that E.S. actually experienced sustained fear.

E.S's testimony and 911 call statements also show that E.S.'s sustained fear was reasonable. E.S. testified that, after defendant first came into the store, defendant looked angrily at E.S., walked to the front of the store near E.S., then "strongly kicked" the pony door, the only barrier that separated defendant from the area behind the counter where E.S. was working. Next, defendant put up his fists and acted as if he were trying to intimidate E.S. and pick a fight with E.S. Defendant then walked out of the store, walked back into the store with a tree branch, held the branch like a baseball bat, and threatened to "bash" E.S.'s head "in" with it when defendant was only three to four feet away from E.S., who was behind the open counter. And during the 911 call, E.S. told the dispatcher that defendant was outside the store, swinging the branch around and repeating his threats to hit E.S. with the tree branch.

As set forth above, defendant claims that T.W.'s testimony, selected parts of E.S.'s testimony, and selected parts of E.S.'s statements during the 911 call, together with the brevity of the 911 call and the brevity of E.S.'s entire encounter with defendant on April 20, all show that E.S. did not *actually* experience sustained fear. This evidence includes T.W.'s testimony that E.S. did not appear to be afraid of defendant, that E.S. walked "aggressively" toward defendant, that E.S. told defendant to "'Get the fuck out of the store'" after defendant kicked the pony door; that E.S. told defendant and T.W. that they could not leave after E.S. had called 911; and that defendant was "at all times" standing behind T.W. when defendant was holding the tree branch. Defendant also suggests some of this evidence also shows E.S. did not *reasonably* experience sustained fear.

But as discussed, E.S.'s testimony and statements during the 911 call shows that E.S. both actually and reasonably experienced sustained fear, and, importantly, the jury had no reason to discredit any of E.S.'s testimony or statements during the 911 call. Defendant's claim that the court erroneously failed to instruct on attempted criminal threats relies on selected points of evidence. We agree that this evidence, viewed in isolation from the rest of the record, could be construed as indicating that E.S. did not actually or reasonably experience sustained fear. But based on the entire record, including E.S.'s testimony and statements during the 911 call, we discern no reasonable probability that the jury would have discredited any of E.S.'s testimony and statements during the 911 call, based on any of the evidence defendant relies on. Thus, we discern no reasonable probability, or reasonable chance, that the jury would have convicted

defendant of the lesser offense attempted criminal threats, rather than the completed crime, had the jury been instructed on attempted criminal threats.

B. *Remand for Resentencing on Defendant's Prior Serious Felony Conviction*

Defendant claims, the People concede, and we agree that the matter must be remanded to the trial court to exercise its discretion to strike defendant's prior serious felony conviction for sentencing purposes, pursuant to Senate Bill 1393. (*People v. Garcia*, *supra*, 28 Cal.App.5th at pp. 970-972.) Senate Bill 1393, which went into effect on January 1, 2019, after defendant was sentenced on May 4, 2018, amended sections 667, subdivision (a) and 1385 to vest trial courts with discretion, which they previously did not have, to strike a prior serious felony conviction for sentencing purposes, rather than to impose a five-year term on the conviction as they were required to do under the former versions of the statutes. (*People v. Garcia*, *supra*, at p. 971.) But before defendant is resentenced, the court must determine whether he is eligible for a pretrial mental health diversion program pursuant to section 1001.36, as we next explain.

C. *Remand to Determine Defendant's Eligibility for Mental Health Diversion*

Defendant's probation report states that, although is mental health is "good," he was diagnosed in 2008 with Bipolar Disorder and Schizo-Affective Disorder. On May 4, 2018, the date the probation report was filed and defendant was sentenced, defendant had prescribed medications for his previously diagnosed Bipolar and Schizo-Affective Disorders. Defendant reported he had been hospitalized three times for mental health treatment, most recently in 2013, when he spent two weeks at Oasis Mental Hospital.

Based on his mental health diagnoses, defendant claims the judgment must be conditionally reversed and the matter remanded to the trial court with directions to determine whether he is eligible for a pretrial mental health diversion program pursuant to section 1001.36. The People argue conditional reversal and remand is unwarranted because (1) section 1001.36 does not apply retroactively, and (2) even if it did, defendant is ineligible for a mental health diversion program because he has a prior strike conviction. We conclude that section 1001.36 applies retroactively, and defendant's prior strike conviction does not disqualify him for a mental health diversion program under section 1001.36.

1. Section 1001.36 Applies Retroactively

Enacted effective June 27, 2018, while this appeal was pending, section 1001.36 created a "pretrial diversion" program for defendants with certain diagnosed mental disorders, including bipolar disorder and schizoaffective disorder, which defendant was diagnosed as having in 2008. (*Frahs*, *supra*, 27 Cal.App.4th at p. 789; § 1001.36, subds. (a), (b)(1), (c).) Effective January 1, 2019, the Legislature amended section 1001.36 to prohibit its use if the defendant is charged with murder, voluntary manslaughter, rape, other sex crimes, and other specified charges. (§ 1001.36, subd. (b)(2)(A)-(H); Stats. 2018, c. 1005 § 1.)

In *Frahs*, Division Three of this court concluded that section 1001.36 applies *retroactively* to all defendants whose judgments, like defendant's, were not final when section 1001.36 went into effect on Jun 27, 2018. (*Frahs*, *supra*, 27 Cal.App.5th at pp.

790-791.) More recently, in *Craine*, the Fifth District Court of Appeal disagreed with the reasoning of *Frahs* and held, based on the language of section 1001.36, its legislative history, and other considerations, that "section 1001.36 does not apply retroactively to defendants whose cases have progressed beyond trial, adjudication of guilt, and sentencing." (*Craine*, *supra*, ___ Cal.App.5th at p. ___ (2019 Cal.App.LEXIS 482 at *25.) Defendant's case has progressed beyond trial, adjudication, and sentencing, but it is not final on appeal.

On December 27, 2018, the Supreme Court granted review in *Frahs* to determine whether section 1001.36 applies retroactively (S252220). Because the *Frahs* and *Craine* courts have thoroughly addressed the reasons for and against the retroactive versus prospective application of section 1001.36, it is unnecessary to discuss these reasons in detail. Suffice it to say that we agree with the *Frahs* court that the Legislature implicitly intended section 1001.36 to apply retroactively to all defendants whose judgments, like defendant's, were not final when section 1001.36 went into effect on June 27, 2018. Thus, we conditionally reverse the judgment and remand the matter for the court for further proceedings as discussed in subsection 2, *post*.

2. Conditional Reversal and Remand Procedures

The *Frahs* court adopted a conditional reversal and remand procedure which requires the trial court to "conduct a mental health diversion eligibility hearing under the applicable provisions of section 1001.36." (*Frahs*, *supra*, 27 Cal.App.5th at p. 792.) "When conducting the eligibility hearing, the court shall, to the extent possible, treat the

matter as though [the defendant] had moved for pretrial diversion after the charges had been filed, but prior to their adjudication." (*Ibid*.)

As discussed in *Frahs*, section 1001.36 sets forth six criteria for determining whether a defendant is eligible for pretrial diversion: "First, the court must be 'satisfied that the defendant suffers from a mental disorder' listed in the statute. (§ 1001.36, subd. (b)(1).) Second, the court must also be 'satisfied that the defendant's mental disorder played a significant role in the commission of the charged offense.' (§ 1001.36, subd. (b)(2).) Third, 'a qualified mental health expert' must opine that 'the defendant's symptoms motivating the criminal behavior would respond to mental health treatment.' (§ 1001.36, subd. (b)(3).) Fourth, subject to certain exceptions, the defendant must consent to diversion and waive his or her right to a speedy trial. (§ 1001.36, subd. (b)(4).) Fifth, the defendant must agree 'to comply with the treatment as a condition of diversion.' (§ 1001.36, subd. (b)(5).) [Sixth] [a]nd finally, the court must be 'satisfied that the defendant will not pose an unreasonable risk of danger to public safety . . . if treated in the community.' (§ 1001.36, subd. (b)(6).)" (*Frahs*, *supra*, 27 Cal.App.5th at p. 789.)

"If a trial court determines that a defendant meets the six requirements, then the court must also determine whether 'the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant.' (§ 1001.36, subd. (c)(1)(A).) The court may then grant diversion and refer the defendant to an approved treatment program. (§ 1001.36, subd. (c)(1)(B).)

Thereafter, the provider 'shall provide regular reports to the court, the defense, and the prosecutor on the defendant's progress in treatment.' (§ 1001.36, subd. (c)(2).) 'The period during which criminal proceedings against the defendant may be diverted shall be no longer than two years.' (§1001.36, subd. (c)(3).) [¶] If the defendant commits additional crimes, or otherwise performs unsatisfactorily in diversion, then the court may reinstate criminal proceedings. (§ 1001.36, subd. (d).) However, if the defendant performs 'satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings.' (§ 1001.36, subd. (e).)" (*Frahs*, *supra*, 27 Cal.App.5th at pp. 789-790.)

3. Defendant's Prior Strike Does Not Disqualify Him for Diversion

The People claim defendant's prior strike renders him "statutorily ineligible" for pretrial diversion under section 1001.36, but nothing in the statute supports this claim. To be sure, defendant's prior strike rendered him statutorily ineligible *for probation* on his current offense at sentencing. (§ 667, subd. (c) (2).) But, as noted, in determining whether defendant is eligible for pretrial diversion under section 1001.36, the court must treat defendant as though he had moved for pretrial diversion after the charges had been filed but *before* the charges were adjudicated. (*Frahs*, *supra*, 27 Cal.App.5th at p. 792.) Thus, defendant's prior strike does not render him ineligible for pretrial diversion under section 1001.36. Additionally, nothing in the record indicates that remand for a section 1001.36 eligibility hearing will necessarily be futile, in light of defendant's diagnosed mental health conditions. (See, e.g., *People v. McVey* (2018) 24 Cal.App.5th 405, 419.)

## IV.

## DISPOSITION

The judgment is reversed conditionally. The matter is remanded to the trial court with directions to conduct a mental health diversion eligibility hearing pursuant to section 1001.36. If the court finds the statutory criteria are met, it may grant diversion, and if defendant successfully completes diversion, the court shall dismiss the charges. If the court determines defendant is not eligible for mental health diversion, or if defendant does not successfully complete diversion, the judgment shall be reinstated, but defendant must be resentenced. At resentencing, the court must exercise its discretion whether to strike defendant's prior serious felony conviction for sentencing purposes or to reimpose a five-year term on defendant's prior serious felony conviction.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
J.

We concur:

MILLER
Acting, P. J.

RAPHAEL
J.